(2)

No. 98-536

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

TOMMY OLMSTEAD, Commissioner of the Department of Human Resources of the State of Georgia, RONALD C. HOGAN, Superintendent of Georgia Regional Hospital/Atlanta, and ERNESTINE PITTMAN, Executive Director of the Fulton County Regional Board,

Petitioners,

v.

L.C. and E.W., each by JONATHAN ZIMRING as guardian ad litem and next friend,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Did the Eleventh Circuit correctly conclude that to require L.C. and E.W. to receive services in a segregated, institutional setting when each was qualified to receive appropriate services in an existing, more integrated setting violated Title II of the ADA?

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STATEMENT OF THE CASE

A. Claims and Facts

Petitioners have misstated several facts. First, Respondents did not claim as stated by Petitioners that the Americans with Disabilities Act ("ADA") "required the

provision of [community-based] . . . treatment." (Pet. at 3.)[1] Respondents claimed only that the provision of services by a public entity in a segregated setting was discriminatory if the disabled person qualified for an existing program in a more integrated setting.

Second, although Petitioners repeatedly assert that the State lacked funding to place the Respondents in a community-based setting, (Pet. at 3-4.) the record reveals other more pernicious reasons why Respondents were not provided with disability services in an appropriate, integrated setting. Contrary to the Petitioners' misleading suggestion that L.C. and E.W. were provided with community placements "as funding became available" — as if that result would have followed as a matter of routine had this litigation not been commenced — the undisputed facts show that, in L.C.'s case, her treatment staff was discouraged from pursuing the very program where she was placed after this case was filed. The Petitioners did not contend until this litigation that funds were unavailable to place L.C. Similarly, Petitioners never contended that the State lacked the funds to provide care for E.W. until after she joined this suit.

B. Proceedings Below

As noted in the petition, the Court of Appeals[2] based its opinion in this case in part on a regulation under the ADA

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[1] References to the Petition will be cited as "Pet. at ____." References to the materials included in Petitioners' appendix will be cited as "Pet. App. at ____." Finally, references to the materials included in Respondents' Appendix attached hereto will be cited as "Resp. App. at ____."

[2] The panel consisted of Circuit Judges Tjoflat and Barkett and District Judge Propst (sitting by designation).

promulgated by the Department of Justice.[3] *L.C. v. Olmstead*, 138 F.3d 893, 896-97 (11th Cir. 1998). That regulation, which is referred to by the court as the integration regulation, requires that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). The court concluded that "[t]here can be little question that the plain language of § 35.130(d) prohibits a state from providing services to individuals with disabilities in an unnecessarily segregated setting." 138 F.3d at 897. In reaching its decision, the Court of Appeals found that the integration regulation was consistent with specific congressional findings[4] and the legislative history of the ADA. *Id.* at 898. Furthermore, the court concluded that the integration regulation was consistent with the "congressional mandate" in § 12134(b) that regulations be "'consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations . . . applicable to recipients of Federal financial assistance under [section 504 of the Rehabilitation Act].'" 138 F.3d at 896 (quoting 42 U.S.C. § 12134(b)).

> Congress' decision to incorporate the § 504 coordination regulations is particularly significant here. The Attorney General's § 504 coordination regulations mandate that recipients of federal

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[3] The Department of Justice took part as amicus curiae in the Eleventh Circuit.

[4] For example, as the Court of Appeals noted, Congress found that "discrimination against individuals with disabilities persists in a wide variety of areas of social life, including 'institutionalization,' 42 U.S.C. § 12101(a)(3) (1995), and that 'individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion . . . [and] segregation . . . .' 42 U.S.C. § 12101(a)(5)." *L.C.*, 138 F.3d at 898.

> financial assistance "administer programs and activities *in the most integrated setting appropriate to the needs of qualified handicapped persons*." 28 C.F.R. § 41.51(d) (1997) (emphasis added). By requiring the Attorney General to follow the § 504 coordination regulations — including the explicit integration requirement — Congress expressly mandated that individuals with disabilities receive public services in the most integrated setting appropriate to their needs. Conforming to this mandate, § 35.130(d) tracks this very language.

Id. at 897-98.

After reviewing the specific facts concerning L.C. and E.W., the court determined that the confinement of L.C. and E.W. to a state mental hospital was discriminatory in violation of the integration regulation. *Id.* at 902. The court found that summary judgment was properly granted since all the experts agreed that Respondents could be appropriately treated in less segregated environments. *Id.* at 903. The court held that the application of the integration regulation to these facts was appropriate and consistent with the Department of Justice's interpretation of the regulation. *Id.* at 898.

Petitioners repeatedly misstate the court's holding as a finding that institutionalization constitutes "discrimination *per se*" (Pet. at 8, 10) and assert without basis that the decision grants a "*per se* right to community placement." (Pet. at 15.) The Court of Appeals' decision does not suggest either result. Rather, it ensures that L.C. and E.W. will not be unnecessarily segregated if they are qualified for appropriate services in a more integrated, existing program. *L.C.*, 138 F.3d at 900 & n.6. At the same time, the decision is clear that the ADA would not prevent their re-institutionalization if necessary. *Id.* at 903.

Additionally, the remand ordered by the Court of Appeals provides the State with the opportunity to show that accommodating these two individuals with integrated services would require unreasonable expenditures. *Id.* at 905.

ARGUMENT

I. Neither of the State's Claims Is Procedurally Postured for This Court's Review.

A. The Ruling of the Eleventh Circuit Is Not a Final Decision.

The Court of Appeals did not issue a final ruling in this case. Instead, the Eleventh Circuit remanded this action to the district court for additional findings on the State's principal defense that additional funds would be required for L.C. and E.W.'s care in a less segregated setting and that the expenditure of those funds would cause a "fundamental alteration" in its programs. *L.C.*, 138 F.3d at 904-05. "[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967). "[E]xcept in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). The writ should be denied "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co. v. Jacksonville, T. & K. W. Ry.*, 148 U.S. 372, 384 (1893). The State has suggested no reason whatsoever why this case should be heard at this juncture despite the remand to the district court.

B. The State's Constitutional Arguments Were Not Presented and Decided Below.

The State of Georgia raised absolutely no argument in the district court that Congress might lack enforcement power under section five of the Fourteenth Amendment to forbid discriminatory institutionalization. Needless to say, the district court did not rule on any such issue. (Pet. App. 31a-42a.) The State gave scant mention to any section five issue in its brief to the Court of Appeals, mentioning it in only a single, abbreviated paragraph. (Resp. App. at A-2.) Like the district court, the Court of Appeals in its opinion made no mention of section five. (Pet. App. 1a-30a.)

This Court should deny review of the section five issue. In deciding a case in a virtually identical procedural posture, this Court remarked: "We do not address another issue presented by petitioners: whether application of the ADA to [respondents] is a constitutional exercise of Congress's power under . . . § 5 of the Fourteenth Amendment. Petitioners raise this question [here], but it was addressed by neither the District Court nor the Court of Appeals." *Pennsylvania Dep't of Corrections v. Yeskey*, 118 S. Ct. 1952, 1956 (1998) (citations omitted).

This Court traditionally denies review of questions not presented and decided below. Where, as here, no issue is raised in the district court, review is denied unless error is "obvious, or . . . seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 160 (1936). Here the State also failed to obtain a section five ruling in the Court of Appeals. "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). "These principles help to maintain the integrity of the process

of certiorari." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992). Once again, the State has offered no reason why this Court should deviate from its usual denial of procedurally inapt cases.

II. The Eleventh Circuit's Decision Is Correct and Does Not Raise an Important Issue Warranting Certiorari.

A. The Decision Below Does Not Conflict with That of Any Other Federal Court of Appeals.

1. *The Two Courts of Appeals That Have Decided Whether Unnecessary Segregation Is Discrimination Under the ADA Reached the Same Conclusion.*

There is absolutely no conflict in the circuits on this issue. The Eleventh Circuit in this case and the Third Circuit in *Helen L. v. DiDario*, 46 F.3d 325 (3d Cir.), *cert. denied*, 516 U.S. 813 (1995) agree that the ADA prohibits public entities from requiring a disabled person to receive disability services in a segregated program if the individual's needs can be met in an existing, appropriate, more integrated program. In *Helen L.*, the Third Circuit held that "the ADA and its attendant regulations clearly define unnecessary segregation as a form of illegal discrimination against the disabled." *Id.* at 333. This conclusion was reached after a careful investigation of the ADA's predecessor, § 504 of the Rehabilitation Act of 1973, and a well-reasoned review of the ADA, its legislative history, its regulations, and agency interpretation of those regulations.

The Eleventh Circuit in this case reached the same conclusion. Like the court in *Helen L.*,[5] the Eleventh Circuit concluded that the ADA and its legislative history, as well as its implementing regulations and their agency interpretation, "plainly prohibit a state from treating individuals with disabilities in a segregated environment where a more integrated setting would be appropriate." 138 F.3d at 897.

2. *Petitioners Cite to Irrelevant Cases Decided Under the Rehabilitation Act of 1973 To Create a False "Conflict."*

Petitioners' argument that a conflict exists is based on a group of cases decided under a different statute, the Rehabilitation Act of 1973. Among the cases asserted by Petitioners to conflict with the Eleventh Circuit's decision in this case are one decided by the Eleventh Circuit, *S.H. v. Edwards*, 886 F.2d 292 (11th Cir. 1989) (en banc), and one by the Third Circuit, *Clark v. Cohen*, 794 F.2d 79 (3rd Cir. 1985). Notably, neither the Eleventh Circuit in this case nor the Third Circuit in *Helen L.* were concerned that their decisions created a conflict with this circuit precedent. As stated by the Eleventh

[5] Hoping to trigger alarm, Petitioners declare that "Shepard's citations showed '170 Citing References'" to *Helen L.*, (Pet. at 8 n.4) implying that other courts are running amok with what they consider to be a misguided decision. Examination of these cases, however, reveals that few made any reference to the central holding of the case. Instead, the vast majority were employment discrimination cases (ADA, Title III) and had nothing to do with the provisions of the ADA pertinent to this case (ADA, Title II). Moreover, the references to *Helen L.* were generally used to support basic propositions about the ADA (*e.g.*: the ADA was enacted to expand § 504; regulations promulgated by an agency are entitled to considerable weight, etc.). Finally, many of the Shepard's citations were simply multiple references to the same case citing *Helen L.*, which appeared in different reporters.

Circuit, "nothing in *S.H.* or these other cases remotely touches on the issues presented by this appeal . . . . [N]one of the cases cited by the State involved claims under the express integration regulation of either the ADA or the § 504 coordination regulations, and therefore, those cases are inapposite here." *L.C.*, 138 F.3d at 901. Similarly, the Third Circuit, referring to its own *Clark v. Cohen* decision, stated that "we were not there concerned with the integration mandate of the ADA or the Rehabilitation Act" and noted that "[t]he language of 28 C.F.R. § 35.130(d) is very different." *Helen L.*, 46 F.3d at 333.

The only two other Court of Appeals cases cited in Petitioners' string cite of supposedly conflicting decisions likewise did not involve claims under the ADA, the integration regulation, or even the § 504 coordination regulations. *See P.C. v. McLaughlin*, 913 F.2d 1033 (2d Cir. 1990); *Phillips v. Thompson*, 715 F.2d 365 (7th Cir. 1983). Petitioners' purported circuit conflict is illusory.[6]

Petitioners' secondary argument, that *Helen L.* has created "confusion" within the district courts, is likewise erroneous. Each of the five district court cases cited by Petitioners as illustrative of this supposed confusion is entirely consistent with *Helen L.* and the decision of the Eleventh Circuit. In three of the cases, the district courts found that the ADA prohibits a

[6] Indeed, only two of the cases cited by Petitioners to support their claim of a purported "conflict" involved the ADA and its integration regulation. *See Conner v. Branstad*, 839 F. Supp. 1346 (S.D. Iowa 1993); *Williams v. Secretary of Exec. Office*, 609 N.E.2d 447 (Mass. 1993). Both are factually distinct and thus do not address the issue here. *Conner* involved a dispute regarding the qualification of the Plaintiffs for existing integrated services and a claim that the state should *create* services, a claim not made here. 839 F. Supp. at 1358. In *Williams*, the plaintiffs were not in segregated programs. 609 N.E.2d at 451-52.

public entity from discriminating against an individual based on the severity of her disability.[7] In the two remaining cases, the courts found that the ADA prohibits a public entity from discriminating against an individual by segregating her unnecessarily.[8] Petitioners imply that these two forms of discrimination are inconsistent and cannot both be prohibited by the ADA. Certainly, none of the cited cases held, or even implied, that such a limitation exists. As the Eleventh Circuit noted, the language and legislative history of the ADA show that Congress was concerned with both forms of discrimination. 138 F.3d at 897-902.

Petitioners concede that their experts found L.C. and E.W. to be qualified for more integrated services. Each, in fact, is receiving integrated services after years of segregated, institutional programs. Respondents have been living successfully in the community — L.C. since February 1996 and E.W. since July 1997. The State is merely seeking power to unnecessarily re-segregate them. No conflict in the circuits exists on the issue decided by the Court of Appeals in this case; therefore, there is no justification for a grant of a writ.

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[7] *Cable v. Department of Developmental Servs.*, 973 F. Supp. 937 (C.D. Cal. 1997); *Messier v. Southbury Training Sch.*, 916 F. Supp. 133 (D. Conn. 1996); *Williams v. Wasserman*, 937 F. Supp. 524 (D. Md. 1996).

[8] *Kathleen S. v. Department of Pub. Welfare*, 1998 U.S. Dist. LEXIS 11819 (E.D. Pa. July 30, 1998); *Charles Q. v. Houstoun*, 1997 U.S. Dist. LEXIS 17305 (M.D. Pa. Sept. 30, 1997).

B. The Court of Appeals Simply Applied a Congressionally-Mandated Regulation to the Undisputed Facts.

As noted above, the Eleventh Circuit held that "§ 12131 of the ADA and the Department of Justice's integration regulation, 28 C.F.R. § 35.130(d), prohibit a state from confining a disabled individual in a state-run institution where that individual could be appropriately treated in a more integrated community setting." *L.C.*, 138 F.3d at 895-96. This case involved the application of that regulation to two disabled people who, in the unanimous view of all the experts, no longer needed to receive services in a segregated, state-run mental institution. *Id.* at 903. Petitioners assert, however, that "formal administrative interpretations" of the ADA integration regulation are inconsistent with the interpretation given the regulation by the courts below and the Department of Justice. (Pet. at 11.) This assertion ignores the difference between the coordination regulations (embraced by Congress in the ADA) and the § 504 regulations adopted by various federal agencies. There were a variety of regulations promulgated under § 504 because each federal agency promulgated its own regulations. Some required integration of disabled persons with non-disabled persons and some also required the integration of disabled persons into the most integrated program appropriate to meet the individual needs of that person. The latter was a requirement of the "coordination regulations."[9]

Likewise, the preamble to the ADA regulations, cited by Petitioners, does not support their contention that the regulation

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[9] The § 504 coordination regulations provide that "[r]ecipients shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. § 41.51(d). (Resp. App. at A-1.)

interpreted in this case requires only integration of the disabled with the non-disabled.[10] Instead, the preamble addresses both aspects of the regulation. Paragraph 35.130(b) deals with the limits on separate programs. Paragraph 35.130(d), by contrast, requires that services be provided in the most appropriate, integrated setting. Even the selected sections of the preamble chosen by Petitioners make this clear:

> Taken together, these provisions are intended to prohibit exclusion and *segregation* of individuals with disabilities *and* the denial of equal opportunity enjoyed by others.
>
> *Integration* is fundamental to the purposes of the Americans with Disabilities Act. . . .
>
> Paragraphs (d) and (e) . . . provide that the public entity must administer services, programs, and activities in the most *integrated* setting appropriate to the needs of qualified individuals with disabilities, *i.e.*, in a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible . . . .

(Pet. App. at 48a, 50a.) (second emphasis added).

Thus, the Court of Appeals correctly followed the plain language of 28 C.F.R. § 35.130(d). Moreover, the Court of

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[10] The Court of Appeals, in addressing the State's argument that "integration" did not apply to services which serve only disabled persons, noted that "[r]educed to its essence, the State's argument is that Title II of the ADA affords no protection to individuals with disabilities who receive public services designed only for individuals with disabilities." *L.C.*, 138 F.3d at 896.

Appeals had the benefit of the Department of Justice's own interpretation of the regulation as expressed in the Preamble and in its amicus submissions to the court. "It is well established 'that an agency's construction of its own regulations is entitled to substantial deference.'" *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150 (1991) (citation omitted). This Court has adhered to this principle in a recent case under Title III of the ADA. In concluding that a person with HIV is covered by the Act, the Court relied on Department of Justice regulations, holding that "[a]s the agency directed by Congress to issue implementing regulations . . . the Department's views are entitled to deference." *Bragdon v. Abbott*, 118 S. Ct. 2196, 2209 (1998).[11]

In short, Title II and its implementing regulations compelled the result below, and there is no relevant conflict in the circuits.

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[11] Petitioners attempt to denigrate the Department of Justice's interpretation expressed in an amicus brief to the Eleventh Circuit by characterizing it as a mere "litigation position" not entitled to deference. This Court, however, has held otherwise. In *Auer v. Robbins*, 117 S. Ct. 905 (1997), this Court held that the Department of Labor's interpretation of its regulations issued under the Fair Labor Standards Act was entitled to customary deference despite the fact that its position was first asserted in an amicus brief because "[t]here [was] no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." 117 S. Ct. at 912. The Department of Justice is in exactly the same position in this litigation, and its interpretation is thus entitled to deference. Moreover, its position was not simply adopted in litigation. The preamble to the integration regulation is equally definitive.

III. Even If It Had Been Properly Asserted Below, Petitioners' Constitutional Claim Would Not Be Certworthy.

A. In This Case, Any Opinion as to the ADA's Validity Under Section Five of the Fourteenth Amendment Would Merely Be Advisory.

Petitioners contend that the ADA's proscription of unnecessary segregation of the mentally disabled exceeds Congress's authority under section five of the Fourteenth Amendment. In making this argument, Petitioners make the implicit, but mistaken, assumption that if the ADA were declared to be an invalid exercise of Congress's section five power, the judgment rendered below would be reversible for that reason. In passing the ADA, however, Congress not only invoked its power to enforce the provisions of the Fourteenth Amendment, but also expressly relied on its power to regulate interstate commerce. *See* 42 U.S.C. § 12101(b)(4) (1995) ("It is the purpose of this chapter . . . to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities."). To hold that Congress exceeded its constitutional authority in enacting the ADA, it would be necessary for this Court to find that Congress exceeded *both* its power to enforce the provisions of the Fourteenth Amendment and its power to regulate interstate commerce. *Cf. Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250-51 (1964) (declining to consider whether Title II of the Civil Rights Act of 1964 might also be a valid enactment under Congress's Fourteenth Amendment enforcement powers, because the Act was found to be a sustainable exercise of Congress's power to regulate interstate commerce). A decision as to the ADA's validity under section five would,

consequently, merely be advisory and would have no impact on the decision below.

B. In Any Event, Every Court of Appeals To Consider the Issue Has Held That the ADA Does Not Exceed Congress's Power To Enforce the Fourteenth Amendment.

Petitioners' reliance on the Court's opinion in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), to support their contention that the ADA exceeds Congress's power to enforce the Fourteenth Amendment is misplaced. *Flores* involved a challenge to the Religious Freedom Restoration Act (RFRA), a statute which purported to overrule the Court's decision in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), by legislatively imposing a requirement that any law burdening religion be justified by a compelling government interest and be the least restrictive means of furthering that compelling governmental interest. *See Flores*, 117 S. Ct. at 2160-62. The Court found that those requirements went beyond "[t]he remedial and preventive nature of Congress' enforcement power," *id.* at 2166, by "attempt[ing] a substantive change in constitutional protections," *id.* at 2170. As stated by the Court:

> While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a

connection, legislation may become substantive in operation and effect.

Id. at 2159.

Both before and after *Flores*, several of the Courts of Appeals have been faced with similar challenges to Congress's exercise of its enforcement power to enact the ADA, and each of them (including four courts after *Flores* was decided) has ruled that the ADA does in fact represent a constitutional exercise of the enforcement power.[12] *See Alsbrook v. City of Maumelle*, 1998 U.S. App. LEXIS 22112 (8th Cir. Sept. 11, 1998);[13] *Kimel v. Florida Bd. of Regents*, 139 F.3d 1426, 1433 (11th Cir. 1998); *Coolbaugh v. Louisiana*, 136 F.3d 430, 433-38 (5th Cir.) *cert. denied*, 67 U.S.L.W. 3230 (Oct. 5, 1998) (No. 97-1941); *Clark v. California Dep't of Corrections*, 123 F.3d 1267, 1270-71 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 2340 (1998); *see also Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481, 487 (7th Cir. 1997) (pre-*Flores*).

[12] Each of these cases considered the question whether Congress had exceeded its powers under section five in the context of a challenge to the ADA's abrogation of sovereign immunity. *See Seminole Tribe v. Florida*, 517 U.S. 44, 60-73 (1996) (Congress may not abrogate a state's Eleventh Amendment immunity pursuant to its Article I power to regulate interstate commerce, but only pursuant to its power to enforce the Fourteenth Amendment). No Eleventh Amendment concern stands in opposition to congressional powers here, however. Petitioners have not claimed — and could not claim — Eleventh Amendment immunity in this case. The only defendants in this lawsuit are state officials, and the only relief sought is declaratory and injunctive. This case thus falls within the doctrine of *Ex Parte Young*. *See Green v. Mansour*, 474 U.S. 64, 68 (1985) ("Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law."); *see, e.g., Armstrong v. Wilson*, 124 F.3d 1019, 1025-26 (9th Cir. 1997) (holding that "the exception to Eleventh Amendment immunity set forth in *Ex parte Young*, . . . squarely applies to allow this action [brought under the ADA and the Rehabilitation Act of 1973, 29 U.S.C. § 794] against named individuals in their official capacity"). Respondents, therefore, could have proceeded with this suit against Petitioners consistent with the Eleventh Amendment, even if the ADA was validly enacted only with respect to Congress's power to regulate interstate commerce.

Petitioners' suggestion that the ADA exceeds Congress's enforcement power because the disabled are not a suspect class has been consistently rejected by those decisions. *See, e.g., Clark*, 123 F.3d at 1270-71 ("We reject California's argument that Congress's power must be limited to the protection of those classes found by the Court to deserve 'special protection' under the Constitution."). In the very case that decided that the mentally retarded were not a suspect class, *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432 (1985), this Court demonstrated that the mentally retarded (like all non-suspect classes) still possess substantial rights under the Equal Protection Clause. In that case, the Court declared invalid under the Equal Protection Clause a requirement that a special-use permit be obtained for a group home for the mentally retarded because the requirement "rest[ed] on an irrational prejudice against the mentally retarded," *id.* at 450, and was, thus, not "rationally related to a legitimate governmental purpose," *id.* at 446. Classifications on the basis of disability are thus a valid subject for congressional legislation pursuant

[13] Prior to its decision in *Alsbrook v. City of Maumelle*, the Eighth Circuit had come to the same conclusion in *Autio v. AFSCME, Local 3139*, 140 F.3d 802 (8th Cir. 1998). The panel's opinion, however, was vacated by the court's order granting rehearing en banc. Subsequently, by an equally divided vote, the en banc court affirmed without opinion the district court's judgment (the result also reached by the prior panel). 1998 U.S. App. LEXIS 24907 (8th Cir. Oct. 5, 1998).

to Congress's powers under the enforcement clause, just as classifications on the basis of race and gender can be. As stated by Judge Posner on behalf of the Seventh Circuit:

> Although the state argues that the ADA is outside the scope of section 5, that argument is refuted by our earlier discussion of Congress's concern that disabled persons are victims of discrimination. Invidious discrimination by governmental agencies, such as Indiana's prison system, violates the equal protection clause even if the discrimination is not racial, though racial discrimination was the original focus of the clause.

Crawford, 115 F.3d at 487.

Also misplaced is Petitioners' attempt to analogize the ADA to RFRA, by suggesting that the ADA has impermissibly enacted a more stringent standard of review applicable to equal protection claims by the disabled than that established by this Court in *Cleburne*. In support of this contention, the Petition cites the ADA section enumerating Congress's factual findings, which concludes in pertinent part that the disabled "are a discrete and insular minority" who have been subjected to a history of intentional discrimination. 42 U.S.C. § 12101(a)(7) (1994). While Petitioners are correct that this language "echoes" footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), Petitioners point to absolutely no indication in the statute itself or in its legislative history that, simply by making this legislative finding, Congress intended to overrule the Court's opinion in *Cleburne*. Nor do Petitioners suggest that the Eleventh Circuit in its opinion below considered the ADA to create a new standard of judicial review for constitutional challenges to agency action. Indeed, as noted by the Third Circuit, "the limited case law is

to the contrary," *Contractors Ass'n v. City of Philadelphia*, 6 F.3d 990, 1001 (3d Cir. 1993) (citing *More v. Farrier*, 984 F.2d 269, 271 n.4 (8th Cir. 1993)), and in the eight years since the ADA was enacted, both this Court and the Courts of Appeals have consistently continued to cite *Cleburne* for the proposition that the mentally retarded and other disabled persons are not a suspect class. *See, e.g., Heller v. Doe*, 509 U.S. 312, 321 (1993);[14] *Kimel*, 139 F.3d at 1441 (Hatchett, *C.J.*, concurring); *id.* at 1449 (Cox, *J.*, dissenting); *Coolbaugh*, 136 F.3d at 433-34 & n.1 (citing five post-ADA Court of Appeals cases in accord with *Cleburne* that the disabled are not a suspect class).

While Congress's legislative finding that the disabled have suffered a history of intentional discrimination may well be persuasive to this Court if it were ever to reconsider its decision in *Cleburne*, Congress did not itself purport to perform that reconsideration for the Court as it did in the context of RFRA. As the Fifth Circuit recently stated:

> In the ADA, Congress included no language attempting to upset the balance of powers and usurp the Court's function of establishing a standard of review by establishing a standard different from the one previously established by the Supreme Court. Congress performed one of its traditional legislative functions by finding facts relating to proposed legislation. The Supreme Court may in the future, if it chooses to do so,

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[14] The Petitioner in *Heller v. Doe* argued that the Court should overrule its prior decision in *Cleburne*, based in part on the passage of the ADA. *See Heller*, 509 U.S. at 335 n.1 (Souter, J., dissenting) (describing the Petitioner's argument). However, the Court refused to consider the argument because it was not properly presented below. 509 U.S. at 319.

> reconsider the *Cleburne* standard of review in light of the Congressional findings. However, this conflict is not a sufficient reason for us to invalidate the ADA.

Coolbaugh, 136 F.3d at 438.

Finally, Petitioners' argument that it is beyond Congress's power to authorize a judicial finding that unnecessary institutionalization is discriminatory on the facts of a particular case, has no merit. As noted above, all of the Courts of Appeals to decide the issue have agreed that, in crafting the ADA, Congress did not cross the line from remedying and preventing constitutional violations to declaring the substance of constitutional rights. Those courts have instead concluded that the ADA demonstrates the "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," as specified by this Court in *Flores*. 117 S. Ct. at 2164; *see, e.g., Coolbaugh*, 136 F.3d at 437 (ADA "is not so draconian or overly sweeping to be considered disproportionate to the serious threat of discrimination Congress perceived"); *Clark*, 123 F.3d at 1270 (neither ADA nor Rehabilitation Act "provides remedies so sweeping that they exceed the harms that they are designed to redress").

The ADA's legislative record, backed by detailed Congressional findings regarding the history of discrimination and segregation faced by the disabled, *see* 42 U.S.C. § 12101(a), amply support the conclusion that, at the time of the ADA's passage, there remained "a significant likelihood of unconstitutional actions and therefore a significant 'evil' to be addressed." *Coolbaugh*, 136 F.3d at 437 (describing the "wide range of evidence," including "seven substantive studies or reports" and a "wealth of testimonial and anecdotal evidence

from a spectrum of parties to support the finding of serious and pervasive discrimination"); *Alsbrook*, 1998 U.S. App. LEXIS 22112, at *10 (noting Congress's "detailed and specific findings regarding the nature and extent of persistent discrimination suffered by individuals with disabilities"). Indeed, as discussed by the Eleventh Circuit, those legislative findings included findings with respect to the very discrimination practiced by the State in this case:

> In enacting the ADA, Congress determined that discrimination against individuals with disabilities persists in a wide variety of areas of social life, including "institutionalization," 42 U.S.C. § 12101(a)(3) (1995), and that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion . . . [and] segregation . . . ." 42 U.S.C. § 12101(a)(5).

L.C., 138 F.3d at 898. The court also noted Congress's finding that: "'Historically, society has tended to isolate and segregate individuals with disabilities, and . . . such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.'" *Id.* (quoting 42 U.S.C. § 12101(a)(2)). In this important respect, the legislative record of the ADA differs from that of RFRA, which as *Flores* emphasized, "lack[ed] examples of modern instances of generally applicable laws passed because of religious bigotry." 117 S. Ct. at 2169; *see Coolbaugh*, 136 F.3d at 438 (emphasizing the distinction); *Alsbrook*, 1998 U.S. App. LEXIS 22122, at *10-11.

The specific holding of the courts in this case — that the ADA precludes a state from "confin[ing] an individual with a disability in an institutionalized setting when a community

placement is appropriate," as determined by the "disabled individual's treating professionals," *L.C.*, 138 F.3d at 897, 902 — also demonstrates a congruence and proportionality between the injury to be prevented and the means adopted to that end. Contrary to the State's insistence that the courts created a "per se" right to treatment in a community setting, the Eleventh Circuit explicitly limited its holding to cases where a mentally disabled person is "unnecessarily segregated," *id.* at 899, that is, where "all the experts agree that, at a given time, the patient could be treated in a more integrated setting," *id.* at 903. In addition, the court noted a further limitation inherent in the ADA that the State "need not provide these services if to do so would require a fundamental alteration in its programs," and the court remanded to the district court for further consideration of this issue. *Id.* at 904. Far from "disturb[ing] the delicate balance between the national government and the State governments," (Pet. at 15-16), as asserted in the Petition, the ADA, as applied by the Eleventh Circuit in this case, presents a measured response to an intractable example of unnecessary segregation, which expressly takes into account the State's concerns in maintaining the fundamental integrity of its programs.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

28 C.F.R. § 41.51(d) (1998):

> Recipients shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

Excerpt from page 34 of Petitioners' Brief to the Eleventh Circuit Court of Appeals:

In light of the active litigation on this issue, it seems reasonable that if Congress believed the courts were incorrect in interpreting its intent on the issue of deinstitutionalization and had wished to clarify it, it would have surely done so when it passed the ADA. Yet neither the explicit language of the ADA nor the legislative history call for or require deinstitutionalization of mentally retarded individuals. If Congress had intended such a radical step, it surely would have clearly stated it. Radical it would have been, because a statute requiring deinstitutionalization on this basis not only would have severe practical effects but also would clearly exceed the congressional power to enforce either the Commerce Clause or the Fourteenth Amendment. See Printz v. United States, 1997 WL 351180 (U.S.) (Brady Act not enforceable under Necessary and Proper Clause); City of Boerne v. Flores, 1997 WL 345322 (U.S.) (Religious Freedom Restoration Act not enforceable under Section 5 of the Fourteenth Amendment).